Supreme Court, U.S.
FILED
AUG 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2045

In The

Supreme Court of the United States

October Term, 1988

GUY GRIDER,

Petitioner,

vs.

TEXAS OIL & GAS CORP., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS TEXAS OIL & GAS CORP. AND TXO PRODUCTION CORP. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ROBERT D. NELON*
G. BABETTE PATTON
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241

Attorneys For Respondents Texas Oil & Gas Corp. and TXO Production Corp.

August 8, 1989
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does a complaint which fails to allege any facts showing injury from the use or investment of racketeering income state a claim for relief under 18 U.S.C. §1964(c) for an alleged violation of 18 U.S.C. §1962(a)?

2. Can a complaint which fails to state a claim for the substantive violation of 18 U.S.C. §1962(a) nevertheless state a claim for relief under 18 U.S.C. §§ 1962(d) and 1964(c) for an alleged conspiracy to commit such a violation?

PARTIES

These respondents' parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates are as follows:

TXO Production Corp. is a wholly-owned subsidiary of Texas Oil & Gas Corp., which is a wholly-owned subsidiary of USX Corporation. The subsidiaries of USX Corporation which are not wholly owned are the following:

Athlone Prospecting & Development Corporation, Ltd.
Companhia Siderurgica Paulista "Cosipa"
Merinda Mineracao (Partnership)
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda. (Partnership)
Mineracao Maraba, Ltda. (Partnership)
Mineracao Xingu, Ltda. (Partnership)
Termerid Mineracao, SA
Torremco Soc. Min. & Com. Ltda. (Partner)
Deepsea Ventures, Inc.
Ocean Mining Associates – Joint Venture
USS-POSCO Industries – Partnership
U. S. Steel France
Compagnie Miniere de l'Ogooue (Comilog)
USS Technology (Japan) Ltd.
ACE Holdings, Ltd.
Coda Holding, Ltd. (CODA-H)
Corporate Officers & Directors Assurance, Ltd. (CODA)
Adela Investment Company, S.A.
Avsteel SWA, Ltd.
Chrome Deposit Corp. (Court Holdings J.V.)
Kappa Mining & Prospecting Co., Ltd.

PARTIES – continued

La Pointe Iron Company
Prieska Copper Mines (Pty.) Ltd.
Societe Des Mines De Fer De Guinee Pour
L'Exploitation Des Monte Nimba (Mifergui Nimba)
Tilden Iron Mining Company
West Union Canal Company, The
Zuari Agro Chemicals Ltd.
Double Eagle Steel Coating Co. – Joint Venture
Live Oak Uranium Operations
National Oilwell – Partnership
Rockland Joint Venture (Cost-Sharing)
BMI Company – Joint Venture
Worthington Specialty Processing – Joint Venture
Arctic LNG Transportation Company
Badger Pipe Line Company
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Petroleum Terminals, Inc.
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Acadian Gas Pipeline System
Bayou Interstate Pipeline System
Calcesieu Gas Gathering System
Laredo Nueces Pipeline Company
Louisiana Industrial Gas Supply System
Neches Pipeline System

PARTIES – continued

Pelican Interstate Gas System
Pelican Transmission System
Ponchartrain Natural Gas System
Spindletop Gas Distribution System
Alabama Intrastate Supply
Red River Pipeline
Red River Pipeline Corporation
Ozark Finance Corporation
Ozark Gas Transmission System

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BRIEF OF RESPONDENTS TEXAS OIL & GAS CORP. AND TXO PRODUCTION CORP. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents Texas Oil & Gas Corp. and TXO Production Corp. respectfully submit that the Petition for Writ of Certiorari should be denied.

STATUTES INVOLVED

The pertinent statutes, 18 U.S.C. §§1962(a), 1962(d), and 1964(c), are set out in the Appendix attached hereto.

STATEMENT OF THE CASE

Respondents incorporate by reference and adopt as their Statement of the Case the introduction and part I of the opinion of the Court of Appeals for the Tenth Circuit entered below and reported at 868 F.2d 1147, 1148-49.

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no conflict among the Circuits on the Questions Presented. The Tenth Circuit correctly interpreted the pertinent statutes in a manner consistent with the common-sense, everyday understanding of the language of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 *et seq.*, and Congress' gloss on it. If, in fact, the Tenth Circuit's correct interpretation of RICO permits some alleged corporate perpetrators of racketeering acts to escape its reach, then that "defect" is one inherent in the statute as written and beyond the power of the Court to correct. Because the Tenth Circuit's correct interpretation of the pertinent statutes is not in conflict with decisions of other Circuits, there is no reason to grant the writ.

REASONS FOR DENYING THE WRIT

1. No Conflict is Presented Among the Circuits by the Tenth Circuit's Correct Interpretation of RICO Sections 1962(a) and 1964(c).

Petitioner argues that the Tenth Circuit's reading of RICO sections 1962(a), which makes unlawful the use or investment in an enterprise of income derived from a pattern of racketeering, and 1964(c), which confers standing to bring a civil action upon those persons injured by reason of the violation of section 1962(a), is squarely in conflict with decisions from the Second and Fifth Circuits. No such conflict between Circuit decisions exists, and the purported conflict affords no ground to grant the writ requested by Petitioner.

Conflict among the decisions of the Circuits on the same matter may in an appropriate case be a reason to grant a writ of certiorari. Supreme Court Rule 17.1(a). When this Court has granted a writ on that ground, however, it has generally been in the face of a well-developed conflict where numerous Circuits sharply disagree on an important question. *See, e.g., H. J., Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, ___, 57 U.S.L.W. 4951, 4956 (1989) ("widest and most persistent circuit split on an issue of federal law in recent memory") (Scalia, J., concurring); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 486 and nn. 5-6 (1985) ("variety of approaches taken by the lower courts"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 and n. 10 (1981) (circuits split 6-5); *Marks v. United States*, 430 U.S. 188, 189 and n. 1 (1977) (circuits split 2-3, with other circuits taking intermediate position). And the existence of the

conflict has usually been recognized not only by this Court but by the Circuits as well. *See, e.g., United States v. McElroy*, 644 F.2d 274, 282 (3rd Cir.), *cert. granted*, 454 U.S. 815 (1981), *aff'd*, 455 U.S. 642 (1982) ("The majority of this court disagrees with the recent Tenth Circuit *en banc* decision. . . ."); *O'Malley v. United States*, 340 F.2d 930, 932 (7th Cir. 1964), *cert. granted*, 382 U.S. 810 (1965), *rev'd*, 383 U.S. 627 (1966) (" . . . an opinion in which the [First Circuit] admitted . . . that it was unable to agree with the Seventh Circuit.").

In the present case, no such sharp, well-developed conflict among the Circuits exists, if indeed there is any conflict at all. The Tenth Circuit considered the Questions Presented in this case in depth, arriving at the correct conclusion that Petitioner had failed to state a claim under RICO sections 1962(a), 1962(d), and 1964(c). The Third Circuit, in *Rose v. Bartle*, 871 F.2d 331 (3rd Cir. 1989), interpreted the relationship between the substantive violation defined in section 1962(a) and the requirements for standing stated in section 1964(c) in the same way as the Tenth Circuit. *Id.* at 356-58.

Petitioner contends that the Second Circuit in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1643 (1989), and the Fifth Circuit in *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir. 1989), "have taken a contrary position." Petition for Writ of Certiorari p. 9. They have not. Other than noting in passing that the plaintiffs in those cases claimed that the defendants violated "18 U.S.C. §§1962(a)-(d)," *Bankers Trust*, 859 F.2d at 1099, *Ocean Energy*, 868 F.2d at 742, neither case specifically discusses section 1962(a) or the necessary allegations

under section 1964(c) to confer standing on a plaintiff to recover for a violation of section 1962(a). Indeed, both the general discussion of RICO in those cases and the specific discussion of sections 1962(b) and (c) in *Ocean Energy*, 868 F.2d at 749, suggest strongly that the standing issue expressly decided by the Tenth Circuit and presented as the first question in this case was neither considered nor decided by the Second or Fifth Circuits.

The Tenth Circuit itself certainly perceived no conflict, concluding in its opinion below that "[a]lthough numerous district court decisions have addressed this issue, we have found no reported circuit court opinion on point," 868 F.2d at 1149, even though *Bankers Trust* had already been decided and was argued by Petitioner to be persuasive contrary authority which justified rehearing the Tenth Circuit's initial decision.

Even if one were to sense some degree of conflict between the express holding of the Tenth Circuit and the dictum of the *Bankers Trust* and *Ocean Energy* cases, Petitioner offers no cogent reason why such minimal conflict can be resolved only by prompt action by this Court. To the contrary, the Circuits should be allowed to consider in specific and concrete cases the question presented by the Tenth Circuit's holding to see if any such conflict is perceived and thereafter resolved.

Moreover, the Petition should be denied because the Tenth Circuit has correctly construed sections 1962(a) and 1964(c) in "a common-sense, everyday understanding of RICO's language and Congress' gloss on it." *H. J., Inc. v Northwestern Bell Telephone Co.*, ___ U.S. at ___, 57 U.S.L.W. at 4954 (1989). Section 1962(a) "renders criminally and

civilly liable 'any person' who uses or invests income derived 'from a pattern of racketeering activity' to acquire an interest in or to operate an enterprise engaged in interstate commerce." *Id.* at 4951. That section does not, as Petitioner repeatedly suggests, make it unlawful to engage in racketeering acts or to receive racketeering income; rather, as the Tenth Circuit succinctly stated, "the statute prohibits a person who *has received* such income *from using or investing it* in the proscribed manner." 868 F.2d at 1149 (emphasis by the court). Thus, since section 1964(c) gives standing to assert a civil claim only to those who are injured "by reason of a violation of section 1962," it follows "from the plain language of these two provisions that a plaintiff seeking civil damages for a violation of section 1962(a) must plead facts tending to show that he was injured by the use or investment of racketeering income." *Ibid.*

Neither the district court nor the Tenth Circuit could find any allegations in Petitioner's complaint that he was injured by the use or investment of racketeering income. The Tenth Circuit's interpretation of sections 1962(a) and 1964(c) was correct; Petitioner's complaint was properly dismissed; and there is no reason to grant the requested writ.

That conclusion is unaltered by Petitioner's arguments that white collar crime is on the rise and a liberal interpretation of RICO is necessary to prevent corporations that engage in patterns of racketeering activity from slipping the RICO net. Petition for Writ of Certiorari pp. 12-16, 24-27. The Tenth Circuit's holding is neither liberal nor illiberal; it is reflective of "the legislative purpose . . . expressed by the ordinary meaning of the words used."

H. J., Inc. v. Northwestern Bell Telephone Co., ___ U.S. at ___, 57 U.S.L.W. at 4953 (1989) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). If a straightforward interpretation of RICO derived from a common-sense, everyday understanding of the statutory text leaves a hole in the net, then it is a legislative problem not a judicial one. As this Court most recently said, "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court." *Id.*, ___ U.S. at ___, 57 U.S.L.W. at 4956.

2. No Conflict is Presented Among the Lower Courts by the Tenth Circuit's Correct Interpretation of RICO Sections 1962(d) and 1964(c).

Petitioner fails to cite *any* opinions which are in conflict with the Tenth Circuit's correct interpretation of RICO sections 1962(d) and 1964(c) that a failure to allege injury from a substantive RICO violation precludes a claim for conspiracy to commit such a violation. In both cases cited by Petitioner dealing with a claim for conspiracy under section 1962(d), the plaintiffs suffered injuries resulting from underlying substantive violations. *See Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230 (1987) (defendants convicted of criminal RICO violations and conspiracy to commit such violations); *Williams v. Hall*, 683 F.Supp. 639 (E.D. Ky. 1988)(the plaintiff's evidence, if believed, was sufficient to prove violation of §§1962(a) and 1962(c), which then gave rise to a claim under §1962(d)).

In *Nalle v. Oyster*, 230 U.S. 165 (1913), cited by Petitioner, this Court, regarding a claim for conspiracy to

commit libel, stated that since "the alleged libel was privileged and thus not actionable, it follows plainly enough that a conspiracy to publish it is not actionable." *Id.* at 183. Here, as reasoned by the District Court and the Tenth Circuit, since Petitioner failed to allege any injury from a substantive RICO violation, it "follows plainly enough" that he has likewise failed to show how the alleged conspiracy to commit that violation caused him injury.

Petitioner cites several other Circuit opinions dealing with the elements necessary to state a claim for civil conspiracy. However, none of these cases deals with section 1962(d) and none supports the proposition that it is unnecessary to allege injury from a substantive violation to support a claim for conspiracy to commit such a violation.

Because there are no circuit opinions which are in conflict with the Tenth Circuit's correct interpretation of section 1962(d),[1] the Petition for Writ of Certiorari should be denied.

---

[1] The Tenth Circuit has itself consistently interpreted section 1962(d) in relation to the substantive violations defined in subsections (a) through (c). *See Edwards v. First Nat. Bank, Bartlesville, Ok.*, 872 F.2d 347, 352 (10th Cir. 1989) ("[T]he conspiracy claim falls when the substantive claim . . . is deficient."); *Condict v. Condict*, 826 F.2d 923, 927 (10th Cir. 1987) (same); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 927 n.2 (10th Cir. 1987) (same).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT D. NELON*
G. BABETTE PATTON
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102
Telephone: (405) 272-9241

Attorneys For Respondents
Texas Oil & Gas Corp. and
TXO Production Corp.

August 8, 1989
*Counsel of Record

APPENDIX A

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

* * *

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * *